



ChangeLab Solutions

Law & policy innovation for the common good.

Model Licensing Ordinance for Healthy Food Retailers

Developed by ChangeLab Solutions, a nonprofit organization that provides legal information on matters relating to public health. The legal information in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

This Model Licensing Ordinance for Healthy Food Retailers (Model Ordinance) is based on ChangeLab Solutions' legal research and analysis, as well as the research and evidence base linking lack of access to healthy foods and overconcentration of unhealthy foods with overweight/obesity and chronic disease. It is intended to be used as one potential policy intervention to increase healthy options in all stores that sell food and grocery items, and it is intended to complement programmatic work to increase healthy food options.

This Introduction and Report summarizes our nonpartisan analysis of the research on these issues and the rationale for a licensing ordinance as one possible policy intervention. It is intended for broad distribution to the public for the purpose of education and dissemination of information. Our presentation of this Model Ordinance, including this Introduction and Report, is based on our independent and objective analysis of the relevant law, evidence, and available data, and should enable readers to draw their own opinions and conclusions about the merits of this Model Ordinance.

Correlation Between Access to Healthy Foods and Overweight/Obesity

More than two-thirds of American adults, and almost one third of children and teens, are overweight or obese. Obesity increases risk for many types of chronic disease, including high blood pressure, high cholesterol, diabetes, heart disease, stroke, arthritis, and cancer. Obesity and overweight not only affect health and happiness for the affected individual, but they also cost our country billions of dollars in health care and lost productivity.ⁱ While obesity affects a cross-section of American society, low-income people and people of color are disproportionately affected. Blacks and Latinos experience higher obesity rates than Whites in almost every state, while poverty is correlated with obesity, regardless of race or ethnicity.ⁱⁱ

The states with the lowest rates of fruit and vegetable consumption are also the states with the highest rates of obesity, while the states with the highest rates of fruit and vegetable consumption were among the

least obese states in the U.S.ⁱⁱⁱ Consumption of produce and whole grains is also linked to lower risk for cardiovascular disease, while consumption of saturated fat, trans fat, and refined sugars is linked to higher risk for cardiovascular disease.^{iv} Between 1985 and 2008, the average adult's daily caloric intake increased by approximately 300 calories,^v with nearly half of this increase coming from added fats and oils. During the same period of time, American adults ate less produce than recommended by dietary guidelines.^{vi}

The presence of a full-service grocery store or supermarket generally correlates with increased fruit and vegetable intake among residents in the same neighborhood or census district.^{vii} Conversely, communities that lack access to supermarkets may have higher BMI and higher rates of premature death and chronic disease.^{viii} Neighborhoods with more fast food restaurants and convenience stores than grocery stores experience high rates of obesity and chronic disease across all income brackets.^{ix}

Many neighborhoods have a gross undersupply or complete lack of grocery stores and supermarkets. Food deserts – areas that lack affordable and nutritious food options – are disproportionately found in low-income neighborhoods and neighborhoods of color.^x Residents in low-income areas also spend more time traveling to the nearest grocery store than residents of higher-income areas.^{xi} Even within low-income neighborhoods that do have supermarkets, stores in these areas tend to offer fewer healthy food options than similar stores in more affluent neighborhoods.^{xii}

While supermarkets are severely lacking in low-income neighborhoods and neighborhoods of color, small grocery stores, convenience stores, liquor stores, and fast food restaurants are in abundant supply.^{xiii} Low-income census tracts have more than twice the amount of convenience stores and four times as many small grocery stores as high-income tracts.^{xiv} In low-income neighborhoods where options are limited, small food retailers can become an important food source for local families. They also frequently supply snacks for children attending nearby schools.^{xv} The variety and quality of foods in small food stores also tends to be lower than in grocery stores, with many small food retailers selling little or no fresh produce.^{xvi}

Some studies have disputed the correlation between proximity to supermarkets and local residential diet. For example, one 2011 study analyzed the association between longitudinal diet and health data among young adults and neighborhood food retail environments and found no relationship between the availability of supermarkets and dietary behavior, including produce consumption. The study found mixed results for the association between grocery store availability and dietary behavior.^{xvii}

Alternatively, other studies have found no correlation between proximity to supermarkets and overall local residential health. One study of the association between food retail environments and body mass index (BMI) among adults in rural California found that adult women who lived closer to chain supermarkets had higher BMI than those who lived farther away from chain supermarkets.^{xviii} This study also showed that higher neighborhood density of small grocery stores is associated with higher BMI in women.

The results of these studies underscores that many factors have contributed to the obesity epidemic, and there is no single solution that can address this issue independently. For example, the use of various supermarkets and grocery stores is influenced by transportation options and mobility, and neighborhoods that lack access to fresh foods often have a higher prevalence of other factors that are associated with obesity and chronic disease. In addition, physical activity is a critical factor in combating obesity; states with the highest rates of physical inactivity also had among the highest rates of obesity nationwide.^{xix}

Just as there are many factors contributing to the obesity epidemic, there are many potential policy interventions to reduce rates of obesity, including policies and programs to increase access to healthy foods, decrease consumption of unhealthy foods, and increase opportunities for physical activity. A multifaceted combination of programmatic and policy approaches, including licensing, will be necessary to reverse the epidemic.

Licensing as a Policy Solution to Promote Healthier Food Retail

ChangeLab Solutions has developed this Model Ordinance as a tool to

help communities increase access to healthy foods in all neighborhoods, as part of a multipronged effort to reduce obesity and related chronic health conditions.

Communities across the United States have instituted programs to increase the availability of produce and staple foods in the community, especially in corner stores and other small retailers. Most of these efforts have been non-regulatory, relying instead on incentives and grant programs that have no penalties. While programs are an important type of public health intervention, they may be more effective when supplemented with policies. Programs are resource-intensive, vulnerable to budget cuts, and have limited reach, whereas policies can reach more people with fewer public resources by changing the environmental factors that affect health and disease.

Licensing

Licensing is a regulatory policy through which an entity engaged in a specified business or profession must obtain a license from the government in order to legally operate.^{xx} A “license” is defined as “a right or permission granted in accordance with law . . . to engage in some business or occupation, to do some act, or to engage in some transaction which but for such license would be unlawful.”^{xxi} To obtain the license, the business must agree to abide by certain conditions and operational standards, or risk penalties for noncompliance, including suspension or revocation of the license. The conditional nature of licenses means that they are also an efficient way for governments to enforce existing state and federal laws, in addition to newly adopted conditions of operation.^{xxii} For example, local tobacco retailer licensing ordinances have been extremely effective in enforcing existing statewide tobacco laws, such as the prohibition of selling tobacco to minors.^{xxiii}

Because licenses are generally personal to the holder and do not create property rights, licensing can be a more immediate means of regulating business activity than land use policies like zoning ordinances or Conditional Use Permits (CUPs).^{xxiv}

Model Healthy Food Retailer Licensing

This Model Ordinance requires that businesses engaged in retail sales of food and grocery items obtain a license. All licensed businesses are required to stock a specified amount of produce and staple foods, and are also required to comply with certain additional conditions and existing laws.

By requiring all eligible food stores to carry a minimum amount of staple food options and produce in order to receive a license, public health and city officials can have a large impact on the food supply in low-income neighborhoods. In addition, if all stores devote more shelf space to staple foods and produce, less space will be dedicated to foods that are high in fat, sugar, and sodium.

In addition, the requirement to obtain a license provides an opportunity for retailer education and outreach, and enables the government to facilitate healthy retailer environments by working directly with retailers.

Implementing and Enforcing this Model Ordinance

When considering this licensing policy, it is important to assess the existing regulatory environment for all food retailers in the community, and how the license requirements will fit within and complement the existing regulatory framework. For example, many states require a license or permit for some types of retailers. In some cases, there may be existing regulations that can be amended to include some or all of the components of this Model Ordinance.

In addition, there are several government agencies that will be involved in implementing and enforcing the requirements of this Model Ordinance. Among other things, the local government will be responsible for creating a license application and issuing licenses, accepting and allocating license fees, providing retailer education and outreach, monitoring compliance and administering incentives, and enforcing violations. This will likely include several agencies; deciding

which agencies will handle which tasks, and working with those agencies early in the policy adoption process, will be critical to the success of the policy. Some of these duties are already handled by various government agencies to implement and enforce other laws; some will require the creation of new processes.

Finally, it is critical to the success of any policy to educate and reach out to the businesses affected by this ordinance. The Model Ordinance includes several mandatory educational/outreach components; those can be tailored to suit the conditions in your community.

Legal Issues

To determine whether your community can implement the Model Ordinance, it is important to review both state and local law.

Licensing Authority

The police power is the primary source of authority for non-federal licensing statutes, regulations, and ordinances.^{xxv} “Police power” is the term used to describe the power of government to regulate private conduct to protect and further the public’s health, safety, or general welfare. In many states, local governments have considerable discretion when enacting regulations, including those affecting business operations.^{xxvi} Whether a local government has the power to regulate retailers – and to implement this Model Ordinance – is usually determined by state law. In addition, local authority to enact this ordinance may be limited (or preempted) by existing state licensing systems for some or all food retailers. Because local government police power varies considerably, it is important to review state law to determine whether your city or county can implement the Model Ordinance.

State Retail Food Laws

In most communities, state law regulates the health and sanitation requirements for food retailers. To help improve food safety nationwide, the U.S. Food and Drug Administration (FDA) has developed a model Food Code that sets forth sanitation and food-handling requirements for restaurants and other food establishments.^{xxvii} Forty-nine states and three U.S. territories have adopted some form of the model Food Code to regulate food retail

sales.^{xxviii} Some states have adopted the model Food Code without alteration; other states have made changes. Because state law varies, before a community enacts this Model Ordinance it is also important to review the state retail food code to determine whether the state law permits its enactment and whether all of the proposed requirements for food retailers are permissible.

Regulatory Takings and Vested Rights Doctrines

Because this Model Ordinance would impose new obligations on many existing businesses and require that they stock certain minimum amounts of produce and staple foods, some retailers may argue that this constitutes a “regulatory taking” or violates a retailer’s “vested rights.”

Regulatory Takings

The Fifth Amendment to the United States Constitution (and similar provisions in State Constitutions) prohibits the government from taking private property without just compensation. Although this often applies to physical seizures of property – when, for example, the government needs to use the underlying land to build a road or some other structure to benefit the public – regulations that impact business operations may also constitute a “regulatory taking” in violation of the federal or a state constitution. Opponents of this Model Ordinance may claim that a requirement that retailers devote a specified amount of shelf space to product and staple foods constitutes a “regulatory taking” that is unlawful unless the government provides compensation to the affected businesses. Although this is a complex area of law, as a legal matter this would most likely come down to a balancing test – balancing the extent of the intrusion and the government’s interest. In this case the government interest is compelling (ensuring that residents have access to healthy food as a means to reduce obesity, overweight, and chronic disease) and the intrusion minimal in comparison.

Extensive analyses of the takings doctrine, as applied to this and other policies, can be found on our website at:

www.changelabsolutions.org/publications/limits-government-power-over-private-property. ChangeLab Solutions has available both an analysis of the federal takings doctrine, and a state-by-state analysis.

“Vested Rights”

A “vested right” is a right that has so completely accrued to a person or

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business that the government's ability to alter that right is restricted. Zoning and other land use laws often implicate vested rights if the government attempts to impose new zoning requirements on businesses that already operate under existing law; therefore, many land use laws "grandfather" nonconforming uses. Although vested rights is a well-established doctrine in the zoning context, its applicability in the licensing context is less widely recognized, and most courts find that a business license is a privilege rather than a property right for the purpose of "vested rights" analysis.^{xxix} Therefore, imposing license requirements on existing businesses is less likely than a zoning law to violate a retailer's "vested rights." Note that a license could be construed to create some rights *during the term of the license*, so any changes in the requirements of the license should take effect upon renewal of the license.

Developing an Ordinance

The language in the Model Ordinance is designed to be tailored to the needs of an individual community. The language written in *italics* provides different options or explains the type of information that needs to be inserted in the blank spaces in the ordinance; the areas left blank represent policy decisions for your community. The "comments" provide additional information and explanation. In considering which options to choose, the community should balance public health benefits against practical and political considerations in the particular jurisdiction. One purpose of including a variety of options is to stimulate broad thinking about the types of provisions a community might wish to explore, even beyond those described in the model.

Conclusion

A licensing requirement for food retailers is potentially a very effective policy to increase the availability of healthy food, particularly in low-income communities and "food deserts." As a policy approach, licensing can also effectively complement existing and future programmatic work as well. In addition, as governments look for ways to improve efficiencies, business licensing is one way to begin to streamline regulatory processes for businesses that typically are subject to several layers of regulation. In this way, a licensing policy should be viewed as something broader than merely a public health intervention.

**AN ORDINANCE OF THE [CITY / COUNTY] OF [____]
REQUIRING THE LICENSURE OF FOOD RETAILERS
AND AMENDING THE [____] MUNICIPAL CODE**

The [Municipality] of [____] does ordain as follows:

COMMENT: This is introductory boilerplate language that should be adapted to the conventional form used in the jurisdiction.

SECTION I. See APPENDIX A: Findings.

COMMENT: A draft ordinance based on this model legislation should include “findings” of fact that support the purposes of the legislation. The findings section is part of the ordinance and legislative record, but it usually does not become codified in the municipal code. The findings contain factual information supporting the need for the law – in this case, documenting the lack of access to healthy foods in many communities, and the health effects of a diet lacking in fresh and healthy foods. A list of findings supporting this model legislation appears in “Appendix A: Findings.” Communities may select findings from that list to insert here, along with additional findings addressing the specific conditions in the particular community

SECTION II. The [____] Municipal Code is hereby amended to add a new chapter [XX] to read as follows:

Sec. [XX.010]. DEFINITIONS. The following words and phrases, whenever used in this chapter, shall have the meanings defined in this section:

(--) “Dairy Products” are animal- and plant-derived milks without added caloric sweeteners and animal- and plant-derived low-fat and nonfat yogurts and cheeses, including lactose-free/-reduced products.

COMMENT: Food retailers will be required to stock a certain amount of defined Dairy products under this ordinance. This definition includes all animal and plant-based milks, regardless of fat content, but does not include milks with added sugars. If you would like to include flavored milk as a qualifying Dairy product, you could amend this definition to remove the phrase “without added caloric sweeteners.” You could also include lower-sugar milks by setting a threshold amount of sugar and including milks below that threshold. Yogurts and cheeses must be low-fat or nonfat; you could also amend this definition to include all yogurts and cheeses regardless of fat content.

- (--)"Department" means [____], and any agency or Person designated by the [City / County] to enforce or implement the provisions of this chapter.

COMMENT: This term is used in the ordinance to refer to the city or county agency charged with primary responsibility for implementation and enforcement of the ordinance, including retailer outreach and education, and inspections. As there are numerous functions involved in implementing and enforcing this ordinance, there will likely be more than one government agency involved. For example, the primary Department charged with implementation and enforcement of this ordinance should be familiar with the substantive requirements and how to inspect for compliance, usually a Health Department, Environmental Health Department, or similar government agency. The agency that accepts applications and issues licenses may be a different agency, such as a Finance Department or Economic Development Department.

- (--)"Food" means a raw, cooked, or processed edible substance, ice, beverage, or ingredient, which is used or intended for use or for sale in whole or in part for human consumption.
- (--)"Food Retailer" means any retailer operating in a fixed location with more than [200] square feet of Selling Area, whose business is primarily comprised of sales of Food and non-Food grocery products intended for preparation, use or consumption off the retailer's premises. "Food Retailer" does not include:
- (1) a restaurant engaged primarily in the business of selling Food for consumption on premises;
 - (2) a Specialty Food Store;
 - (3) stores that primarily sell a variety of fruits and vegetables;
[and]
 - (4) [list any additional specific exemptions here].

COMMENT: This definition includes all Food Retailers that operate from a fixed location, including Grocery Stores, corner stores, convenience stores and any other business engaged in sales of food for preparation and consumption off premises. This definition is intended to include only brick and

mortar establishments operating in a fixed location, and not impermanent venues such as farmers markets and produce stands.

Very small Food Retailers with less than [200] square feet of Selling Area, are exempt from all requirements of this ordinance. The exact square footage of Selling Area to qualify for an exemption, or whether to establish a minimum threshold size for retailers subject to this ordinance, is a policy choice for your jurisdiction.

Alternatively, your community's zoning code may already include a definition of "food retailer" (or similar term), or multiple definitions depending on size, that you can incorporate into your licensing ordinance.

Specialty Food Stores are specifically exempted from the definition of Food Retailer and are also exempt from all of the requirements of this ordinance. Specialty Food Stores are defined in this ordinance, and would include bakeries, candy stores, ice cream shops, and liquor stores that do not carry a general line of Food items. If you want to exempt other types of retailers, you can amend this definition to specify the types of retailers that will be exempt from all requirements of this ordinance.

Additional exemptions can be added to provisions in Section [XX.020] to exempt certain retailers from specific requirements of this ordinance. Note that several of the definitions in this section incorporate the definition of "Food Retailer," so that if you amend this definition, other definitions may also need to be amended accordingly.

(--)"Grocery Store" means a Food Retailer that has at least [20,000] square feet of Selling Area.

COMMENT: Grocery Stores are distinguished from other Food Retailers by their size. The exact square footage that qualifies a Food Retailer as a Grocery Store varies in different communities; you should include whatever size is appropriate for your community. In addition, many programs, and local codes (and some of the research literature) use the term "supermarket" to refer to large stores. For purposes of this ordinance, the terms "supermarket" and "grocery store" are basically interchangeable and you can use either term; whichever term you use should be used consistently throughout the ordinance.

This definition, along with the definitions of Food Retailer and Small Food Retailer, creates three classes of retailers subject to this ordinance: large Grocery Stores, Small Food Retailers, and all other Food Retailers (e.g., those with between [5,000] and [20,000] square feet of Selling Area, or whatever size parameters you include in your ordinance.) Each of these types of Food Retailers

could be subject to different stocking requirements for Produce and Staple Foods, as appropriate for the size of the store.

Alternatively, you could create just two classifications of Food Retailers: Grocery Stores, and all others Food Retailers that do not meet the size requirements for a Grocery Store. If you would like to do that, you can delete the definition of Small Food Retailer and amend the requirements of Section [XX.020] so that there are separate Staple Food and Produce stocking requirements only for Grocery Stores and Food Retailers.

- (--)"Perishable Foods" means Foods that are not heat-treated, not frozen, and not otherwise preserved in a manner so as to prevent the quality of the Food from being adversely affected if held longer than [7] calendar days under normal shipping and storage conditions.

COMMENT: This definition mirrors the definition of "perishable foods" under regulations implementing the federal Food, Drug and Cosmetic Act. See 21 C.F.R. 1.377. There may be a specific definition adopted by your state that you would like to include in lieu of this definition. This definition is used in the ordinance to require that a portion of the Staple Foods (i.e., Dairy Products, Proteins, and Whole Grains) consist of Perishable Foods; the default shelf life of seven days is used in this definition, but could be amended to whatever maximum shelf life is appropriate for your circumstances.

- (--)"Person" means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

COMMENT: The Municipal Code may contain a definition of "person" and, if so, the definition provided here can be omitted.

- (--)"Produce" means any edible portion of a plant in its raw and natural state, whether offered for sale whole or pre-sliced.
- (--)"Proteins" means lean or low-fat meat and poultry, seafood, eggs, nuts, seeds, beans, peas, and processed soy products.
- (--)"Selling Area" means the [floor area / combined floor area and shelf space] of a store where products of any type are displayed and offered for retail sale.

COMMENT on measuring Selling Area: This ordinance requires that Food Retailers stock a minimum amount of Produce and Staple Foods, measured as a percentage of Selling Area of the store. You may want to use an alternative metric, such as a minimum number of products or varieties of products, in your community.

Selling Area has been incorporated into this ordinance because it can be calculated and applied to all Food Retailers regardless of size, and can be relatively easily verified. There are two options in this definition to calculate the Selling Area: floor area, and floor area combined with shelf space. You should choose a calculation that will work for your community.

Whatever method is adopted, the Department should be able to readily calculate the measurements to check compliance, and should also be able to explain the calculations to retailers.

(--)"Small Food Retailer" means a Food Retailer with less than [5,000] square feet of Selling Area.

COMMENT: Small Food Retailers are distinguished from other Food Retailers by their size. The exact square footage that qualifies a Food Retailer as a Small Food Retailer is a policy choice; you should include whatever size is appropriate for your community.

This definition, along with the definitions of Food Retailer and Grocery Store, creates three classes of retailers subject to this ordinance: large Grocery Stores, Small Food Retailers, and all other Food Retailers (i.e., those with between [5,000] and [20,000] square feet of Selling Area, or whatever size parameters you include in your ordinance.) Each of these types of Food Retailers could be subject to different stocking requirements for Produce and Staple Foods, as appropriate for the size of the store.

Alternatively, you could create just two classifications of Food Retailers: Grocery Stores, and all other Food Retailers that do not meet the size requirements for a Grocery Store. If you would like to do that, you can delete this definition and amend the requirements of Section [XX.020] so that there are separate Staple Food and Produce stocking requirements only for Grocery Stores and Food Retailers.

(--)"Specialty Food Store" means a retail establishment that sells or offers for sale only limited numbers and specific types or classes of Food products and does not carry a general variety of Food

products or non-food grocery products, as determined by the Department.

COMMENT: This definition is intended to exempt from the requirements of this Model Ordinance stores that specialize primarily in one type of food product, such as bakeries, candy shops, ice cream parlors, and liquor stores. You could include a list in this definition of the specific types of stores that would like to exempt from this ordinance in your community.

(--)"Staple Foods" means Dairy Products, Proteins, and Whole Grains intended for human consumption.

COMMENT: This ordinance establishes separate minimum stocking requirements for both Produce and Staple Foods; therefore, Produce is separately defined and not included in this definition even though it is a Staple Food. Refer to the definitions of Dairy Products, Proteins, and Whole Grains to determine what foods are included as Staple Foods. If you would like to include additional foods as Staple Foods, you can amend this definition and/or the definitions of Dairy Products, Proteins, and Whole Grains, as appropriate.

(--)"Whole Grains" means any food in which whole grain is the primary ingredient by weight, and which meets labeling requirements established by the federal Food and Drug Administration for making a health claim as a "whole grain food with moderate fat content."

COMMENT: This definition is based upon the whole grain requirements for the WIC-Eligible Food List, which incorporates the FDA labeling requirements for health claims, as set forth below:

Types of Whole Wheat Bread/Whole Grain Bread/Other Whole Grains

- Whole wheat bread, buns and rolls.
- Whole grain bread, buns and rolls.
- Other whole grains, i.e., brown rice, bulgur, oatmeal, and whole-grain barley without added sugars, fats, oils, or salt (e.g., sodium). May be instant-, quick-, or regular-cooking.
- Soft corn or whole wheat tortillas. (Corn tortillas made from ground masa flour (corn flour) using traditional processing methods are allowed. Examples of primary ingredients meeting the WIC-eligibility criteria include: whole corn, corn (masa), whole ground corn, corn masa flour, masa harina, and white corn flour.

Requirements

Whole wheat must be the primary ingredient by weight in all whole wheat bread products. Whole wheat bread, buns and rolls must also conform to FDA standard of identity at 21 CFR Part 136.180. Whole grain must be the primary ingredient by weight in all whole grain bread, buns and rolls and must also meet FDA labeling requirements for making a health claim as a "whole grain food with moderate fat content."

FDA Labeling Requirements:

1. Contain a minimum of 51% whole grains (using dietary fiber as the indicator).
2. Meet the regulatory definitions for "low saturated fat" at 21 CFR Part 101.62 (\leq 1 g saturated fat per RACC) and "low cholesterol" (\leq 20 mg cholesterol per RACC).
3. Bear quantitative trans fat labeling.
4. Contain \leq 6.5 g total fat per RACC and \leq 0.5 g trans fat per RACC.

Refer to the full health claim notice at:

www.fda.gov/Food/LabelingNutrition/LabelClaims/FDAModernizationActFDAMAClaims/ucm073634.htm

Alternatively, you could create a definition that does not incorporate the WIC standards but does restrict sugars, such as:

(--)"Whole Grains" means any food made from [100%] whole grain wheat, rice, oats, cornmeal, barley, or other cereal grain, but does not include any food with more than [10] grams of sugar per serving.

Sec. [XX.020]. REQUIREMENTS AND PROHIBITIONS

COMMENT: This section contains the requirements that will be mandatory for Food Retailers subject to this ordinance; failure to comply with these requirements could lead to a penalty against the retailer. Which of these requirements to include is a policy decision for your jurisdiction; additional requirements that are specific to your jurisdiction could also be added to this section. Section [XX.030] establishes additional voluntary performance standards and provides for incentives for compliance with the additional standards. Many of the requirements in this section could also be moved to Section [XX.030] so that they are incentivized and not mandatory.

- (a) **FOOD RETAILER LICENSE REQUIRED.** It shall be unlawful for any Person to act as a Food Retailer in the [City / County] without first obtaining and maintaining a valid license pursuant to this chapter for each location at which that activity is to occur.

COMMENT: This is the primary operative section of the ordinance. It requires a license for each retail location. So, for example, a grocery store chain with several locations would need a food retailer license for each store.

Note that because this ordinance may be adopted as an amendment to an existing business license system, it uses the term “license.” A city or county could choose to label the requirement a “permit,” as the two terms are generally interchangeable. The term used should be consistent with other provisions of the city or county code to which this ordinance is added.

- (b) **LAWFUL BUSINESS OPERATION.** In the course of acting as a Food Retailer or in the operation of the business or maintenance of the location for which a license issued, it shall be a violation of this chapter for a licensee, or any of the licensee’s agents or employees, to violate any federal, state or local law applicable to Food storage, handling or sales.

COMMENT: This provision makes licensing an effective tool for comprehensively enforcing existing laws related to Food handling, storage and sales. A city or county can use the license revocation provisions to encourage compliance with all Food-related laws. This can facilitate enforcement of existing food safety laws, especially in low-income communities where enforcement may be lacking.

(c) **DISPLAY OF LICENSE.** Each Food Retailer license shall be prominently displayed in a publicly visible location at the licensed location.

(d) **STOCKING STAPLE FOODS.**

1. Each Food Retailer shall, at all times, stock Staple Foods as follows:

(A) **Grocery Stores:** A Grocery Store shall devote at least [__] percent of Selling Area to Staple Foods;

(B) **Small Food Retailers:** A Small Food Retailer shall devote at least [__] percent of Selling Area to Staple Foods;

(C) **Food Retailers:** a Food Retailer that is neither a Grocery Store nor a Small Food Retailer shall devote at least [__] percent of Selling Area to Staple Foods.

2. The Staple Foods required to be stocked by this subsection shall include Dairy Products, Proteins, and Whole Grains. The Staple Foods requirement cannot be fulfilled by stocking foods primarily from only one of these categories.

3. At least [20] percent of the Selling Area for Staple Foods required to be stocked by this subsection shall consist of Perishable Foods

4. [LIST ANY SPECIFIC EXEMPTIONS FROM STAPLE FOODS REQUIREMENTS HERE.]

COMMENT on Staple Foods stocking requirements: The exact amount of Selling Area required to be devoted to Staple Foods is a policy decision. A very high requirement may make it more difficult for retailers to comply and lead to increased political resistance to the ordinance. For a discussion of the legal issues involved with a mandatory stocking requirement, please refer to the “Introduction and Report” for this Model Ordinance.

Note that this section is designed to create different stocking requirements for Small Food Retailers, Grocery Stores, and all other Food Retailers subject to this ordinance. If you decide to create only two classifications of Food Retailers rather than three, you can amend this section to remove the requirement for

Small Food Retailers, and delete the definition of Small Food Retailer in Section [XX.010].

This section establishes minimum stocking requirements based on a percentage of overall Selling Area. It may be more difficult for some retailers, especially smaller stores, to calculate this measurement. For those stores, or for all stores, you could also establish minimum stocking requirements calculated by the number of varieties of items stocked, by amending the language in sections (1) (A), (B), and (C).

In addition, this section requires that the stocking requirements for Staple Foods include a variety of different foods, including a certain amount of Perishable Foods. These options can be tailored to meet the needs of your community. For example, you might want to reduce the Perishable Foods requirements for smaller stores with slower turnover.

Also note that very small retailers (with less than [200] square feet of Selling Area) and defined “Specialty Food Stores” are exempt from all requirements of this ordinance. If your jurisdiction would like to create additional exemptions from the Staple Foods stocking requirements, you could provide additional exemptions in this subsection.

(e) STOCKING PRODUCE.

1. Each Food Retailer shall, at all times, stock Produce as follows:
 - (A) Grocery Stores: A Grocery Store shall devote at least [__] percent of Selling Area to Produce, and shall offer for sale at least [__] different varieties of Produce at any point in time;
 - (B) Small Food Retailers: A Small Food Retailer shall devote at least [__] percent of Selling Area to Produce, and shall offer for sale at least [__] different varieties of Produce at any point in time;
 - (C) Food Retailers: a Food Retailer that is neither a Grocery Store nor a Small Food Retailer shall devote at least [__] percent of Selling Area to Produce, and shall offer for sale at least [__] different varieties of Produce at any point in time.
2. The Produce offered for sale pursuant to this subsection shall, at all times when offered for sale, be free from spoilage and shall

be equal to or better than the highest grade designation issued by the United States Department of Agriculture.

3. Up to [__] percent of the Selling Area for Produce required to be stocked by this subsection may consist of frozen [or canned] Produce to which no additional ingredients have been added.

COMMENT: This subparagraph allows a certain percentage of the Produce stocking requirement to be fulfilled with frozen produce. If you would also like to allow canned produce (with no additional ingredients) to be counted, add the underlined language in brackets.

4. [LIST ANY ADDITIONAL SPECIFIC EXEMPTIONS FROM PRODUCE REQUIREMENTS HERE.]

COMMENT: The exact amount of Selling Area required to be devoted to Produce, and the number of varieties to require, are policy decisions. A very high requirement may make it more difficult for retailers to comply and lead to increased political resistance to the ordinance. For a discussion of the legal issues involved with a mandatory stocking requirement, please refer to the “Introduction and Report” for this Model Ordinance.

Note that this section is designed to create different stocking requirements for Small Food Retailers, Grocery Stores, and all other Food Retailers subject to this ordinance. If you decide to create only two classifications of Food Retailers rather than three, you can amend this section to remove the requirement for Small Food Retailers, and delete the definition of Small Food Retailer in Section [XX.010].

This section establishes minimum stocking requirements using both a percentage of overall Selling Area and a minimum number of varieties. It may be more difficult for some retailers, especially smaller stores, to calculate a specified percentage of Selling Area. For those stores, or for all stores, you could also establish minimum stocking requirements calculated solely by the number of varieties of items stocked, by amending the language in sections (1) (A), (B), and (C).

This section also allows a portion of the Produce stocking requirement to be fulfilled by frozen Produce with no additives. You could also allow a portion of the Produce stocking requirement to be fulfilled using canned Produce. The exact amount of frozen (or canned) Produce that can be counted toward the overall stocking requirement is a policy decision.

Also note that very small retailers (with less than [200] square feet of Selling Area) and defined “Specialty Food Stores” are exempt from all requirements of this ordinance. If your jurisdiction would like to create additional exemptions from the Produce stocking requirements, you could provide additional exemptions in this subsection.

(f) PARTICIPATION IN FEDERAL NUTRITION ASSISTANCE PROGRAMS.

1. All Food Retailers shall accept Supplemental Nutrition Assistance Program (SNAP) benefits.
- [2. All Food Retailers shall apply to be certified as a WIC vendor to accept benefits provided through the Special Supplemental Nutrition Program for Women, Infants and Children.]

COMMENT: Subparagraph (1) of this section requires all Food Retailers to accept SNAP benefits; subparagraph (2) would require all Food Retailers to participate in the WIC program as well.

For logistical, political, legal or policy reasons, your jurisdiction may not want to require every Food Retailer to apply to become a WIC vendor; if that is the case, delete the bracketed language in subparagraph (2). An alternative is to require that Food Retailers meet the Minimum Stocking Requirements specified for WIC vendors, even if they are not officially participating in the WIC program, to the extent those stocking requirements are not otherwise required by this ordinance.

If, for logistical, political, legal or policy reasons your jurisdiction does not want to require every Food Retailer to accept SNAP, you can amend or delete subparagraph (1) accordingly.

(g) SALES OF BOTTLED SUGAR-SWEETENED BEVERAGES. No more than [__] percent of the Bottled beverages offered for sale by a Food Retailer may be Sugar-Sweetened Beverages.

COMMENT on definition of Sugar-Sweetened Beverages: See Appendix B. There are several definitions that apply specifically to Sugar-sweetened Beverages (SSBs), all of which are set forth in Appendix B. If you include this

restriction on sales of SSBs, insert the definitions from Appendix B into Section [XX.010] in alphabetical order.

This subsection, along with the definition of Sugar-Sweetened Beverage in Appendix B, would only apply to beverages with added caloric sweetener, which are closely associated with obesity and chronic disease according to the data and evidence base. If you would also like to include restrictions on diet beverages, you can include a separate definition for those beverages and include appropriate restrictions in this section or Section [XX.030].

This subsection applies to SSBs sold in containers. Section [XX.030] contains an additional performance standard that would limit the serving size for SSBs sold as Fountain Drinks, and provides an incentive for businesses that comply; this restriction could also be moved to Section [XX.030] so that it is also incentivized rather than mandatory.

If you would also like to include restrictions on sales of syrups or powders that are used to make SSBs, you need to include definitions of those terms, and appropriate restrictions. For sample definitions, and for more information on the health effects of sugar-sweetened beverages and the rationale for regulation of those products, please refer to our *Model Sugar-Sweetened Beverage Tax Legislation*, available at: <http://changelabsolutions.org/publications/sugar-sweetened-beverage-taxes-model-legislation>.

COMMENT on following sections: The following provisions makes a Healthy Food Retailer's License an effective tool for comprehensively enforcing existing laws related to the retail environment, such as alcohol, tobacco and signage laws. A city or county can use the license penalty provisions to encourage compliance with the laws referenced in the following sections; compliance with the incorporated laws is a condition of the license, which, if violated, would lead to penalties under the licensing ordinance. Having a single, locally based enforcement scheme can make enforcement more efficient and create healthier and safer retail environments overall.

There are several laws incorporated by reference in the following sections, and you could include provisions related to other laws that impact the retail environment as well, such as the Americans with Disabilities Act and state laws regulating access for persons with disabilities.

- (h) **COMPLIANCE WITH TOBACCO-RELATED LAWS.** It shall be a violation of this chapter for a Food Retailer, including any of the Food Retailer's agents or employees, to violate any federal, state or local law applicable to Tobacco Products, Tobacco Paraphernalia, or tobacco retailing.

COMMENT on definitions of Tobacco Product and Tobacco Paraphernalia:

See Appendix B. Definitions of Tobacco Products and Tobacco Paraphernalia are set forth in Appendix B. If you include this restriction on sales of those products, insert the definitions from Appendix B into Section [XX.010] in alphabetical order.

- (i) **COMPLIANCE WITH ALCOHOL-RELATED LAWS.** It shall be a violation of this chapter for a Food Retailer, including any of the Food Retailer's agents or employees, to violate any federal, state or local law applicable to alcohol products or alcohol retailing.
- (j) **COMPLIANCE WITH SIGNAGE LAWS.** It shall be a violation of this chapter for any licensee to violate any federal, state or local law regulating exterior, storefront, window, or door signage.
- (k) **MAINTENANCE OF BUSINESS PREMISES.** All Food Retailers shall maintain the interior and exterior of the business premises in a manner that does not constitute a nuisance. At a minimum, a Food Retailer shall:
 - 1. Provide adequate lighting within the business premises, throughout the parking lot, and at all entrances and exits;
 - 2. Provide adequate trash, recycling and composting receptacles;
 - 3. Remove any graffiti on the business premises [within a specified time after notice];
 - 4. Prevent loitering on the business premises;
 - 5. Maintain the cleanliness of all interior and exterior areas of the business premises, including shelf spaces; and
 - 6. Comply with all state laws prohibiting littering;

Sec. [XX.030]. ADDITIONAL PERFORMANCE STANDARDS; INCENTIVES

COMMENT: The additional performance standards in this section would be optional for Food Retailers; if they comply with any of these performance standards, they will be entitled to an incentive as provided in subsection (b) and regulations

promulgated by the Department responsible for administering this ordinance. Failure to comply with these performance standards would not lead to a penalty. Alternatively, some of the performance standards in this section could be included as mandatory requirements in section [XX.020].

Whether to include additional performance standards and incentives is a policy decision for your jurisdiction. If you decide to include incentivized performance standards, you can include some or all of the standards from this list, and you can also include additional standards that are specific to your jurisdiction.

Note that the incentives to be offered are also specific to your jurisdiction, and depend on the specific programs, processes and funding streams available in your jurisdiction. There are numerous programs operating across the United States that provide incentives or assistance for retailers to carry healthier foods, and elements from those existing programs (as well as future programs) can be incorporated into this licensing system.

If you include additional performance standards, you also need to determine exactly what incentives are available, and for which performance standard they apply. The Department responsible for administering this ordinance will need to adopt administrative regulations to implement this section.

Also note that you should not include performance standards in this section that would not be legal to directly impose as a mandatory requirement for Food Retailers. For example if an outright ban on all tobacco advertising would violate the First Amendment, it would also likely be illegal to provide additional government incentives to retailers that voluntarily removed all tobacco advertising.

- (a) In addition to the requirements of Section [XX.020], a Food Retailer that complies any of the following performance standards shall receive an incentive as provided in this section. To qualify for an incentive, a Food Retailer shall voluntarily:
- (1) Exceed the applicable stocking requirement for Produce by an additional [__] percentage points;
 - (2) Exceed the applicable stocking requirement for Staple Foods by an additional [__] percentage points;
 - (3) Not sell or offer for sale alcoholic beverages; **OR** No more than [__] percent of the beverages offered for sale by a Food Retailer may be alcoholic beverages;

COMMENT: This subparagraph contains two alternative policy options relating to alcoholic beverages. If the second option is chosen (to stock fewer alcoholic beverages), you need to also determine what percentage of beverages offered for sale should consist of alcoholic beverages.

- (4) Not sell or offer for sale a single serving of a Fountain Drink that is larger than [16] ounces, and not offer or provide free refills for Fountain Drinks;

COMMENT on definition of Fountain Drink: See Appendix B. There are several definitions that apply specifically to Sugar-sweetened Beverages (SSBs), all of which are set forth in Appendix B. If you decide to include this restriction on sales of SSBs, insert the definitions from Appendix B into Section [XX.010] in alphabetical order.

- (5) Not sell or offer for sale Tobacco Products; **OR** Reduce the total Selling Area for Tobacco Products by [__] percent;

COMMENT on definitions of Tobacco Products: See Appendix B. Definitions of Tobacco Products and Tobacco Paraphernalia are set forth in Appendix B. If you include this restriction on sales of those products, insert the definitions from Appendix B into Section [XX.010] in alphabetical order.

- (6) Display Staple Foods and Produce in high-visibility, high-traffic locations throughout the store, accompanied by easy-to-read signage; and

- (7) [LIST ADDITIONAL PERFORMANCE STANDARDS].

- (b) Businesses that meet any of the performance standards set forth in subsection (a) shall receive one of the following incentives, to be determined by the Department, for each of the performance standards met:

- (1) Expedited processing of the Food Retailer license application, or expedited processing of other licenses or permits required for the business by the [City / County];
- (2) Reduced or waived fees for the Food Retailer license, or reduced or waived fees for other permits or licenses

required for the Food Retailer by the [City / County];

- (3) Technical or financial assistance, or both, to establish or participate in a collective purchasing pool with other Food Retailers in the [City / County];

COMMENT: Collective purchasing pools or cooperatives allow small retailers to combine their purchasing power to take advantage of volume pricing by purchasing larger quantities. It may also allow small retailers to deal with vendors that are not generally accessible to smaller stores.

- (4) Additional individualized technical assistance to comply with the requirements of this chapter;
- (5) Participation in a loan or grant program administered by the [City / County] to assist Food Retailers to comply with the requirements of this chapter;
- (6) A tax exemption or other tax incentives as provided by the [City / County];
- (7) Technical or financial assistance for infrastructure and façade improvements;
- (8) Technical or financial assistance for marketing support, including community assessment, customer surveys, and advertising and promotional support;
- (9) Other incentives as determined by the Department through regulation; and
- (10) [LIST OTHER AVAILABLE INCENTIVES].

COMMENT: The incentives offered will be specific to your jurisdiction, and will depend on the resources available. The Department will need to determine the exact incentives available, and adopt administrative regulations to implement this section.

(c) The Department shall adopt regulations that set forth the following:

- (1) The specific incentives offered by the [City / County] pursuant to

subsection (b);

(2) The specific performance standards that must be met under subsection (a) to qualify for and receive an incentive; and

(3) The procedure for applying for an incentive.

If the incentives available pursuant to subsection (b) change over time, the Department shall adopt updated regulations to reflect the currently available incentives.

Sec. [XX.040]. APPLICATION PROCEDURE.

COMMENT: The following two sections provide details about the application procedures and issuance of the license. Alternatively, these sections could: (1) be shortened and combined and direct the Department to establish these processes through regulation; or (2) incorporate existing licensing application and issuance procedures in your jurisdiction.

- (a) Application for a Food Retailer's license shall be submitted in the name of each Person proposing to conduct retail food sales and shall be signed by each Person or an authorized agent thereof.

It is the responsibility of each Person to be informed regarding all laws applicable to Food sales, including those laws affecting the issuance of a Food Retailer's license. No Person may rely on the issuance of a license as a determination by the [City / County] that the Person has complied with all laws applicable to Food storage, handling or sales. Nothing in this chapter shall be construed to vest in any Person obtaining and maintaining a Food Retailer's license any status or right to act as a Food Retailer in contravention of any provision of law.

All applications shall be submitted on a form supplied by the [Licensing Agency/ Department] and shall contain the following information:

- (1) The name, address, and telephone number of each Person seeking a license.
- (2) The business name, address, and telephone number of the single fixed location for which a license is sought.
- (3) A single name and mailing address authorized by each Person to receive all communications and notices (the "Authorized Address") required by, authorized by, or convenient to the enforcement of this chapter. If an Authorized Address is not supplied, each applicant shall be understood to consent to the provision of notice at the business address specified in subparagraph (2) above.

- (4) Proof that the location for which a Food retailer's license is sought has been issued all required state licenses applicable to sales of food, beverages, alcohol and tobacco, and all other required state licenses to conduct business at the location.
- (5) Whether or not any Person or any agent of the Person has admitted violating, or has been found to have violated, this chapter and, if so, the dates and locations of all such violations within the previous five years.
- (6) Such other information as the [Licensing Agency/ Department] deems necessary for the administration or enforcement of this chapter as specified on the application form required by this section.

COMMENT: This requirement authorizes the Licensing Agency/ Department to establish application forms that require various types of information to aid effective implementation and enforcement of the ordinance.

- (b) A licensed Food Retailer shall inform the [Licensing Agency /Department] in writing of any change in the information submitted on an application for a Food Retailer's license within [ten (10)] business days of a change.

Sec. [XX.050]. ISSUANCE OF LICENSE. Upon the receipt of a complete application for a Food Retailer's license and the license fee required by this chapter, the [Licensing Agency/ Department] shall issue a license unless substantial evidence demonstrates that one or more of the following bases for denial exists:

- (a) The information presented in the application is inaccurate or false. Intentionally supplying inaccurate or false information shall be a violation of this chapter.
- (b) The application seeks authorization for Food retailing by a Person to whom this chapter prohibits a license to be issued.
- (c) The application seeks authorization for Food retailing that is

prohibited pursuant to this chapter, that is unlawful pursuant to this Code [including without limitation the [e.g., zoning ordinance, building code, and business license tax ordinance]], or that is unlawful pursuant to any other law.

COMMENT: This section makes issuance of licenses a mandatory, ministerial duty of staff unless substantial evidence can be shown supporting one of the four justifications for denial of the license.

Although a license technically should not be issued if prohibited elsewhere in the municipal or county code, it is valuable to make note of what other ordinances staff should take into consideration. For example, if the code contains a zoning or conditional use permit ordinance affecting Food Retailers, the licensing ordinance should refer to it directly to assist staff in implementing the ordinance. It is also helpful to cite building codes (to ensure the structure has been permitted) and any business license tax (to ensure that these taxes are also paid).

Sec. [XX.060]. IMPLEMENTATION, EDUCATION, AND OUTREACH

- (a) In order to assist retailers to understand and comply with the requirements of this chapter, the Department shall:
- (1) Prepare a fact sheet, guide, or other educational materials to explain the requirements of this chapter, how inspections will occur, and the penalties for noncompliance. These educational materials shall be mailed to all businesses that sell Food or beverages for off-site consumption, shall be available on the [City/County] website, and shall also be provided to all license applicants at the time of application;
 - (2) Conduct at least [three (3)] trainings annually regarding the requirements of this chapter, and invite all Food Retailers operating in the [City / County] to at least one of the trainings;
 - (3) Provide individualized technical assistance to any Food Retailer requesting such assistance, to help them determine whether their business is in compliance with the requirements of this chapter, and if not, how to gain

compliance; and

(4) Promote within the community the healthy food stocking requirements for Food Retailers.

(b) The written materials, trainings, and technical assistance shall be offered in [language], in addition to English.

(c) Nothing in this section shall create a right of action in any licensee or other Person against the [City / County] or its agents.

Sec. [XX.070]. LICENSE RENEWAL AND EXPIRATION.

A Food Retailer's license is invalid if the appropriate fee has not been timely paid in full or if the term of the license has expired. The term of a Food Retailer license is [one year]. Each Food Retailer shall apply for the renewal of his or her Food Retailer's license and submit the license fee no later than [thirty (30)] days prior to expiration of the term.

COMMENT: The term of licenses is a matter for local policy. If this ordinance is adopted as an amendment to a local business license ordinance, many administrative details, such as the term of licenses, may be covered by the existing license ordinance.

Sec. [XX.080]. LICENSES NONTRANSFERABLE.

(a) A Food Retailer's license may not be transferred from one Person to another or from one location to another. A new Food Retailer's license is required whenever a Food Retailer location has a change in proprietor(s).

COMMENT: This provision requires a new license for any change in ownership. For example, if a Proprietor to whom a license has been issued changes business location, that Proprietor must apply for a new license prior to acting as a Food Retailer at the new location. Or, if the business is sold or otherwise transferred to a new owner, the new owner must apply for a license for that location before acting as a Food Retailer.

(b) Notwithstanding any other provision of this chapter, prior

violations at a location shall continue to be counted against a location and license ineligibility periods shall continue to apply to a location unless the location has been fully transferred to a new Proprietor or fully transferred to entirely new Proprietors in a bona fide business transaction. For purposes of this section, a “bona fide business transaction” means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither of which is under any compulsion to participate in the transaction.

COMMENT: This provision prevents sham transfers of ownership from defeating the effect of past violations. For example, if a retailer who is found in violation of the licensing law subsequently transfers ownership to his brother, and if the brother also then violates the ordinance, it would be counted as the second violation, not the first.

Sec. [XX.090]. FEE FOR LICENSE. The fee to issue or to renew a Food Retailer’s license shall be established from time to time by resolution of the [legislative body]. All fees and interest upon proceeds of fees shall be used exclusively to fund the program. Fees are nonrefundable except as may be required by law.

COMMENT: The licensing fee is a “regulatory fee,” which are fees calculated to provide funding for regulatory programs. The law of regulatory fees varies from state to state, so it is important to determine the authority for regulatory fees in your state. Ideally, the fee should cover all of the costs associated with the program, including administration, implementation, and enforcement. If that approach is legal in your state you could include the following language in this section:

“The fee shall be calculated so as to recover the cost of administration and enforcement of this chapter, including, for example, issuing a license, administering the license program, retailer education, retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this chapter.”

For political, legal, or other reasons you may want to include a lower fee in your ordinance. However, this ordinance creates substantial duties for the Department charged with implementing and enforcing the ordinance, so it is important to have some sustained funding source to cover those costs, whether from the license fee, another source(s), or both.

Sec. [XX.100]. COMPLIANCE MONITORING; EVALUATION.

- (a) Compliance with this chapter shall be monitored by the Department. The [City / County] may designate any number of additional Persons to monitor compliance with this chapter.
- (b) The Department or other Person designated to enforce the provisions of this chapter shall check the compliance of each Food Retailer at least [one (1)] time(s) per twelve (12) month period. The Department may check the compliance of Food Retailers previously found to be in compliance a fewer number of times so that the Department may check the compliance of new licensees and Food Retailers previously found in violation of the licensing law more frequently. Nothing in this section shall create a right of action in any licensee or other Person against the [City / County] or its agents.
- (c) The Department shall develop criteria and components for an independent evaluation to assess the impact that the licensing system imposed by this chapter has on the food retail environment, particularly in underserved communities.

Sec. [XX.110] ADMINISTRATIVE REGULATIONS. The Department is hereby empowered to make such rules and regulations, and provide such procedural measures, as shall be necessary to implement and enforce this chapter.

Sec. [XX.120] VIOLATIONS.

- (a) Noncompliance with any of the requirements of this chapter shall constitute a separate violation. Each day of a continuing violation of this chapter shall constitute a separate violation.
- (b) In addition to any other penalties provided by this chapter or by law, the Department shall notify a Food Retailer in writing regarding any violations of this chapter. For a first violation of any of the requirements of this chapter, the Department shall send a warning letter detailing the violation(s) and shall provide a reasonable time for the Food Retailer to comply. Upon a second or subsequent violation of any of the

requirements of this chapter within a [sixty (60)] month period, the Department may impose any of the penalties in Section [XX.130] against the Food Retailer.

Sec. [XX.130] PENALTIES.

- (a) The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.

COMMENT: This section includes several enforcement mechanisms (administrative, civil and criminal) to provide flexibility to address different kinds, and different degrees, of violation. From a policy perspective, which penalties to pursue is a discretionary matter and depends on the severity of the violation. The following subsections are designed to offer a variety of options to the drafter and to the enforcing agency. Drafters may choose to include some or all of these options. Once the ordinance is enacted, the enforcing agency will have the discretion to choose which enforcement tools to use. As a practical matter, these enforcement options would not be applied simultaneously, although multiple remedies might be used against a particularly egregious violator over time.

For a first violation, note that Section [XX.120] provides that the violator will receive a warning letter. The penalties in this section only apply for a second and subsequent violations within a five-year period.

Generally, for a licensing ordinance, the most significant penalty is suspension or revocation of the license, because during the suspension period the business cannot engage in the conduct authorized by the license (here, food retailing.) Since the ultimate goal of this ordinance is compliance and creating healthy food retail, however, suspension of the license may not be as appropriate as the other penalties set forth in this section.

State law varies with regard to the authority of a local jurisdiction to apply various penalties for violations of local laws. The penalties set forth in this section are examples that must be tailored to the law of your jurisdiction. You may also incorporate existing penalty structures and processes that have proven successful in your jurisdiction. Regardless of what penalties you wish to apply, the procedures must provide the retailer with adequate procedural due process.

(b) ADMINISTRATIVE ENFORCEMENT AND PENALTIES.

- (1) Any Person who violates any of the provisions of this chapter shall be subject to an administrative penalty, not to

exceed \$[_____] for each violation, and not to exceed \$[_____] in total for each thirty (30) day period. Administrative penalties authorized by this section shall be assessed, enforced and collected in accordance with section [specify section of local municipal code providing for administrative enforcement].

- (2) When an authorized enforcing officer or employee determines that there has been a violation of any of the provisions of section [XX.020], the officer or employee may issue an administrative citation to the Person responsible for the violation. For purposes of this section, the licensee is the Person responsible if an officer, employee or agent of the Food Retailer commits the violation.

COMMENT: Many jurisdictions already have an administrative citation provision in the municipal code. If so, a jurisdiction can tailor this section to conform to the existing provisions. If not, you can extend subparagraph (2) to include additional language outlining the citation requirements, such as:

“The citation shall inform the Person responsible of the date, time, place and nature of the violation and the amount of the proposed penalty, and shall state that the penalty is due and payable to the [treasurer] within [_____] business days from the date of the notice, if not contested within the time period specified. The citation shall also state that the Person responsible has the right, pursuant to section [_____] to request administrative review of the citing officer or employee's determination as to the violation and assessment of penalties, and shall set forth the procedure for requesting administrative review.”

- (c) LICENSE SUSPENSION OR REVOCATION. (1) In addition to any other penalty authorized by law, a Food Retailer's license may be suspended or revoked if the Department finds based on a preponderance of the evidence, after the licensee is afforded notice and an opportunity to be heard, that the licensee, or any of the licensee's agents or employees, has violated any of the requirements, conditions, or prohibitions of this chapter or has pleaded guilty, “no contest” or its equivalent, or admitted to a violation of any law designated in Section [XX.020]. Any Person who violates any of the requirements of this chapter may have their license suspended or revoked, as follows:

- (A) A first violation of this chapter shall result in a warning letter issued to the Food Retailer pursuant to Section [XX.120];
 - (B) A second violation of this chapter within a [sixty (60)]-month period shall result in a [ten (10)]-day suspension of the Food Retailer's license;
 - (C) A third violation of this chapter within a [sixty (60)]-month period shall result in a [twenty (20)]-day suspension of the Food Retailer's license;
 - (D) A fourth violation of this chapter within a [sixty (60)]-month period shall result in a [thirty (30)]-day suspension of the Food Retailer's license;
 - (E) A fifth violation of this chapter within a [sixty (60)]-month period shall result in a revocation of the Food Retailer's license.
- (2) Any Person without a valid Food Retailer's license, including a license that has been suspended or revoked, may not engage in Food Retailing.

COMMENT: The exact procedure for revocation of a license is not set forth in this Model Ordinance. The administrative procedure, civil proceeding, or combination of both, should be tailored to the needs of your community and must comply with the basic requirements of due process (notice to retailer and an opportunity to be heard, and right to appeal.)

(d) CIVIL ENFORCEMENT BY INJUNCTIVE RELIEF. The [City Attorney / County Counsel] is hereby authorized to bring an action for injunctive relief to enjoin a violation of this chapter.

(e) CIVIL ENFORCEMENT BY CIVIL PENALTIES.

- (1) Any Person who violates this chapter may be liable for a civil penalty, not to exceed \$[_____] per violation, and not to

exceed \$[_____] in total for each thirty (30) day period.

(2) The [City Attorney / County Counsel] may bring a civil action to recover civil penalties for the violations of this chapter.

(3) Except as otherwise required by law, all monies received by the [City / County] in payment of civil penalties for violation of this chapter shall be deposited in [*specify a dedicated fund for public health issues or obesity specifically*] and used exclusively to [_____].

(4) The [City Attorney / County Counsel] also may seek recovery of the attorney's fees and costs incurred in bringing a civil action pursuant to this section.

(f) CIVIL ENFORCEMENT. Any Person who violates this chapter is guilty of a misdemeanor, punishable by a fine of not more than [_____] or by imprisonment in the [City / County] jail for a period of not more than [_____], or by both such fines or imprisonment.

COMMENT: If a community wishes to make the criminal sanction an infraction instead of a misdemeanor, substitute the following provision for language above:

"Any Person who violates this chapter is guilty of an infraction, punishable by a fine of not more than \$[_____]."

Sec. [XX.140.] SEVERABILITY. If any provision of this chapter, any rule or regulation made under this chapter, or the application of this chapter to any Person or circumstance is held invalid by any court of competent jurisdiction, the remainder of the chapter, rule or regulation, and the application of the provision to other Persons or circumstances shall not be affected. The invalidity of any section or sections or parts of any section of this chapter shall not affect the validity of the remainder of the chapter.

SECTION III. This ordinance and the legal requirements set forth herein shall take effect and be in force from and after [*date*].

COMMENT: It is wise and probably necessary to provide a reasonable time period between the ordinance adoption date and the date that the law takes effect so that Food Retailers have sufficient time to comply.

This tool was developed with support from the Centers for Disease Control and Prevention. Its contents are solely the responsibility of the authors and do not necessarily represent the official views of the Centers for Disease Control and Prevention.

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- ii *Id.* at 20-21.
- iii *Id.* at 27- 28.
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- v US Department of Agriculture, Economic Research Service. Food Availability (Per Capita) Data System, Data Set: Loss-Adjusted Food Availability: Calories. 2011. Available at: www.ers.usda.gov/datafiles/Food_Availabilty_Per_Capita_Data_System/LossAdjusted_Food_Availability/calories.xls
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xx Some governments require a “permit” for regulatory purposes; the terms “permit” and “license” have basically the same meaning in this context.

xxi Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1978 (2011) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1304 (2002)); *See also* Gibbons v. Ogden, 22 U.S. 1, 213 (1824) (“The word ‘license’ means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing”).

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xxiv *See* Kafka v. Mont. Dep’t of Fish Wildlife & Parks, 201 P.3d 8, 20 (Mont. 2008) (“Courts which have directly considered the question . . . have taken a dim view of the notion that government-issued licenses are compensable property interests.”) (citing cases); Conti v. U.S., 291 F.3d 1334, 1340 (Fed. Cir. 2002) (“[C]ourts have held that no property rights are created in permits and licenses.”) (citing cases). *See also* McLaughlin, *supra* note xxii, at 8.

xxv

Cleveland v. U.S., 531 U.S. 12, 21 (2000) (noting that “licensing schemes” are “exercises of state police powers”); *see also* Noesen v. State Dep’t of Regulation & Licensing, Pharmacy Examining Bd., 751 N.W.2d 385, 390 (Wis. Ct. App. 2008) (“[Licensing] statutes are founded on the state’s police power to protect the public welfare and to safeguard the life, health, and property of its citizens.”).

xxvi Ziegler EH, Rathkopf AH and Rathkopf DA. 1 Rathkopf’s The Law of Zoning and Planning § 1:2 (4th ed., 2012).

xxvii U.S. Food and Drug Administration. FDA Food Code 2009, Preface § 2 (2009). Available at: www.fda.gov/Food/FoodSafety/RetailFoodProtection/FoodCode/FoodCode2009/ucm188264.htm#part3

xxviii North Carolina is the one exception, but adopted a food code in 2012 based on the 1976 Model Foodservice Code. . U.S. Food & Drug Admin. *Real Progress in Food Code Adoptions*. 2012. Available at: www.fda.gov/Food/FoodSafety/RetailFoodProtection/FederalStateCooperativePrograms/ucm108156.htm.

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regulations prescribed for such may be changed or modified by the legislature, in the public interest, without subjecting the action to the charge of interfering with contract or vested rights”) (citing *Dantzler v. Callison*, 94 S.E.2d 177 (1956)); *Bourgeois v. State, Dep’t of Commerce*, 41 P.3d 461, 465 (Utah Ct. App. 2002) (“It is axiomatic that a license does not create any vested rights in its holder because a license is not a contract.”); *In re DLC Corp.*, 712 A.2d 389, 392 (Vt. 1998) (“A liquor license . . . is not a contract between the licensee and the state, and it does not give the licensee any vested rights.”).